Appendix 'A'

March 14, 1939.

Hon. Joseph A. Baldwin,
Michigan State Senate,
Lansing, Michigan
Dear Senator Baldwin:

You have requested my opinion on the constitutionality of House Bill No. 66, which is a bill to amend Section 20 of chapter 2 and section 20a of chapter 5 of part 2 of Act No. 319 of the Public Acts of 1927 (School Code).

The amendments in both sections consist of added matter. For convenience, I am setting forth the sections in full with the added matter in capital letters:

Part II

Chapter II

"Sec. 20. No school district shall apply any of the moneys received by it from the primary school interest fund or from any and all other sources for the support and maintenance of any school of a sectarian character, whether the same be under the control of any religious society or made sectarian by the school district board. THE PROVISIONS OF THIS SECTION SHALL NOT BE CONSTRUED TO PROHIBIT THE TRANSPORTATION TO AND FROM SCHOOL OF PUPILS ATTENDING PRIVATE OR PAROCHIAL SCHOOLS AS PROVIDED IN SECTION 20a, PART 2 OF THIS ACT.

Chapter V

"Sec. 20a. The board of education of any school district may enter into a contract with any other district to furnish such transportation for non-resident pupils attending such school: Provided, however, That in no event may the price paid for such transportation be less than the actual cost thereof to the district furnishing the same. The district board or board of education of any school district may furnish transportation for resident pupils to educational programs at county or community fairs, to health clinics in or outside of the school district, and to educational functions in any other school district or community. Any board furnishing transportation may purchase buses on contract, pledging funds received from Act No. 236 of the Public Acts of 1933, as amended.

"THE BOARD OF EDUCATION OF ANY SCHOOL DISTRICT WHICH FURNISHES TRANSPORTATION FOR RESIDENT PUPILS MAY FURNISH TRANSPORTATION FOR CHILDREN RESIDING WITHIN THE DISTRICT WHO ATTEND PRIVATE OR PAROCHIAL SCHOOLS OF ELEMENTARY OR HIGH SCHOOL GRADES: PROVIDED, THAT SUCH SCHOOLS COMPLY WITH THE PROVISIONS OF ACT NO. 302 OF THE PUBLIC ACTS OF 1921. SUCH CHILDREN MAY BE TRANSPORTED WITHOUT CHARGE ALONG THE REGULAR ROUTE OF THE PUBLIC SCHOOL BUS OR CONVEYANCE NEAREST OR MOST EASILY ACCESSIBLE TO THEIR HOMES, TO SUCH PRIVATE OR PAROCHIAL SCHOOL OR TO THE POINT ALONG SUCH REGULAR ROUTE WHICH IS NEAREST OR MOST ACCESSIBLE TO SUCH PRIVATE OR PAROCHIAL SCHOOL: PROVIDED, THAT NOTH-

ING CONTAINED IN THIS SECTION SHALL BE CONSTRUED TO REQUIRE OR PERMIT TRANSPORTATION OF PUPILS TO A PRIVATE OR PAROCHIAL SCHOOL ATTENDING IN THE PRIMARY GRADES WHERE SUCH TRANSPORTATION IS FURNISHED BY THE DISTRICT FOR HIGH SCHOOL PUPILS ONLY, NOR TO REQUIRE OR PERMIT THE TRANSPORTATION OF PUPILS TO A PRIVATE OR PAROCHIAL SCHOOL, ATTENDING THE HIGH SCHOOL GRADES WHERE SUCH TRANSPORTATION IS FURNISHED BY THE DISTRICT FOR PRIMARY PUPILS ONLY."

Under the law as it now stands, transportation cannot be furnished to other than public schools, for the reason that the legislature has not yet authorized such transportation. Bates Township School District v. Elliott, 276 Mich. 575.

Section 1 of Article XI of the Constitution of Michigan reads as follows:

> "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

Section 9 of the same article provides in part:

> "The legislature shall continue a system of primary schools, whereby every school district in the state shall provide for the education of its pupils without charge for tuition; and all instruction in such schools shall be conducted in the English language. * * *."

Section 3 of Article II of the same document reads as follows:

"Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief."

Section 12 of Article X of the same document reads as follows:

"The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private."

The above are the only constitutional provisions having any bearing on the question under discussion.

Under our Constitution, the Legislature has control over the schools.

Stuart v. School District, 30 Mich. 69;

Perrizo v. Kesler, 93 Mich. 280;

Pingree v. Board of Education, 99 Mich. 404;

Attorney General v. Lowrey, 131 Mich. 639;

Attorney General v. Board of Education, 154 Mich. 584;

Attorney General v. Connolly, 193 Mich. 499;

Collins v. City of Detroit, 195 Mich. 330;

Child Welfare Society v. Kennedy School District, 220 Mich. 290;

Van Fleet v. Oltman, 244 Mich. 241;

Bates Township School District v. Elliott, supra;

In re School District No. 6, 284 Mich. 132.

Acts of the legislature should not be declared unconstitutional unless it clearly appears that they violate some provision of the Constitution.

Attorney General v. Preston, 56 Mich. 177.

This case involved the constitutionality of an act of the legislature of 1875. I quote from page 179 of the opinion:

> "And the question is now presented, in what respect and to what extent, has the Constitution limited this power of the Legislature? In the examination of this question it is to be borne in mind that before a law can be held invalid, it must be a plain violation of some provision contained in the Constitution. Scott v. Smart's Ex'rs., 1 Mich. 307; People v. Gallagher, 4 Mich. 244; People v. Blodgett, 13 Mich. 127; People v. Mahaney id. 481; Whallon v. Ingham Circuit Judge, 51 Mich. 503. 'In cases of doubt every possible presumption not clearly inconsistent with the language and subject-matter is to be made in favor of the constitutionality of the act' in question. Sears v. Cottrell, 5 Mich. 259; Tabor v. Cook, 15 Mich. 323; Ogden v. Saunders, 12 Wheat. 270; Cooley's Const. Lim. and cases cited at page 182."

This rule has been followed by the Supreme Court down to the present time.

Albert v. Gibson, 141 Mich. 698;

Attorney General v. Connolly, supra;

Fremont Canning Co. v. Waters, 209 Mich. 178;

Child Welfare Society v. Kennedy School District, supra;

Thompson v. Auditor General, 261 Mich. 624;

Fortner v. Koch, 272 Mich. 273.

Our Supreme Court has held that the use of school rooms and the time of the teacher in reading excerpts from the Bible for fifteen minutes at the close of each day's session, did not violate the constitutional provision now found in Section 3 of Article II of the Constitution quoted above. Pfeiffer v. Board of Education, 118 Mich. 560.

Section 1, Chapter 17, Part 2 of Act No. 319, Public Acts of 1927, being Section 7526, Compiled Laws of 1929, provides in part:

"Except as provided in section 2 of this chapter, every parent, guardian or other person in the state of Michigan, having control and charge of any child between the ages of seven and sixteen years, shall be required to send such child, equipped with the proper textbooks necessary to pursue his or her school work, to the public schools during the entire school year, and such attendance shall be continuous and consecutive for the school year fixed by the district in which such parent, guardian, or other person in parental relation may reside: * * *."

Section 2, being Section 7527, Compiled Laws of 1929, provides in part:

> "In the following cases children shall not be required to attend the public schools:
>
> "(a) Any child who is attending regularly and is being taught in a private, parochial, or denominational school which has complied with all the provisions of this act and teaches such branches as are taught in the public schools to children of corresponding age and grade as determined by the course of study for the public schools of the district within which such private, denominational, or parochial school is located, or who upon the completion of the work in such schools, shall hold an eighth grade diploma granted by the county commissioner of schools, or in appropriate cases a statement from the superintendent of schools that he has completed sufficient work to entitle him to an eighth grade diploma; * * *".

Act No. 302 of the Public Acts of 1921, being Sections 8151-8157, inclusive, Compiled Laws of 1929, is, as indicated by its title, an act to provide for the supervision of private, denominational and parochial schools; to provide the manner of securing funds in payment of the expense of such supervision; to provide the qualifications of the teachers in such schools; and to provide for the endorsement of the provisions hereof.

The use of public funds for the purpose of purchasing books for children attending parochial school is not in violation of the constitutional provision against taking money from the treasury directly or indirectly in aid of any church, sect, or denomination of religion, or using of public funds for the support of any private or sectarian school.

Borden v. State Board of Education, 168 La. 1005; 123 So. 655; 67 A.L.R. 1183. This was an injunction proceedings to restrain the providing of free textbooks out of public funds for the use of pupils attending private or parochial schools. The case was affirmed by the Supreme Court of the United States in Cochran v. State Board of Education, 281 U. S. 370, 74 L. Ed. 913. The opinion was written by Justice Hughes, and I quote from pages 914 and 915 of the opinion as reported in 74 L. Ed.:

> "The appellants, as citizens and taxpayers of the state of Louisiana, brought this suit to restrain the state board of education and other state officials from expending any part of the severance tax fund in purchasing school books and in supplying them free of cost to the school children of the state, under Acts No. 100 and No. 143 of 1928, upon the ground that the legislation violated specified provisions of the Constitution of the state, and also § 4 of article 4 and the 14th Amendment of the Federal Constitution. The supreme court of the state affirmed the judgment of the trial court which refused to issue an injunction. 168 La. 1030, 123 So. 644.
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> "Act No. 100 of 1928 provided that the severance tax fund of the state, after allowing funds and appropriations as required by the state Constitution, should be devoted, 'first, to supplying school books to the school children of the state.' The board of education was directed to provide 'school books for school children free of cost to such children.' Act No. 143 of 1928 made appropriations in accordance with the above provisions.
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> "The supreme court of the state, following its decision in Borden v. Louisiana State Bd. of Education,

168 La. 1005, 67 A.L.R. 1183, 123 So. 655, held that these acts were not repugnant to either the state or the Federal Constitution.

"No substantial Federal question is presented under § 4 of article 4 of the Federal Constitution guaranteeing to every state a republican form of government, as questions arising under this provision are political, not judicial, in character. Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. decided March 12, 1930 (281 U. S. 74, ante, 710, 66 A.L.R. 1460, 50 Sup. Ct. Rep. 228), and cases there cited.

"The contention of the appellant under the 14th Amendment is that taxation for the purchase of school books constituted a taking of private property for a private purpose. Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. Ed. 455. The purpose is said to be to aid private, religious, sectarian and other schools not embraced in the public educational system of the state by furnishing textbooks free to the children attending such private schools. The operation and effect of the legislation in question were described by the supreme court of the state as follows (168 La. p. 1020, 67 A.L.R. 1183, 123 So. 655):

" 'One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books

are to be furnished them for their use free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. . . What the statutes contemplate is that the same books that ar furnished children attending public schools, shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected adapted to religious instruction.'

"The court also stated, although the point is not of importance in relation to the Federal question, that it was 'only the use of the books that is granted to the children, or, in other words, the books are lent to them.'

"Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

Our Supreme Court has never passed upon the question as to whether or not the furnishing of transportation for

pupils attending a public school constitutes an appropriation of public money for the benefit of a religious sect or society, theological or religious seminary, or the payment of taxes for the support of a teacher of religion. They have, however, held that, as indicated above, the use of the time of a teacher in a school room for fifteen minutes each day for the purpose of reading excerpts from the Bible would not constitute such violation of the Constitution. Pfeiffer v. Board of Education, supra.

The Court of Appeals of Maryland, on May 20, 1938, held constitutional an act of the legislature providing that children attending schools not receiving State aid should be entitled to transportation on school buses on the same terms as public school children. Board of Education of Baltimore County v. Wheat, 199 Atl. 628. This case is of particular interest here because the decision is based principally upon the proposition that it is in furtherance of education based upon the compulsory education laws which are similar to such provisions in our statute. See Chapter 17, Part 2, Act No. 319, Public Acts of 1927, being Sections 7526 to 7550, Compiled Laws of 1929. I quote from page 632 of the opinion of the court written by Chief Justice Bond:

> "Starting with the interest which the state is acknowledged to have in seeing that all children of school age acquire an education by attending some school, and the fact that they are complying with the law in going to such a school as the parochial school involved in this case, their accommodation in the buses appears to the court to be within the proper limits of enforcement of the duty imposed. Compliance having been made dangerous in a much greater degree, removal of the danger to any extent would seem to be within the same public function. Even though the statute ordering it may be open to another interpretation, if the trans-

portation with this object is a constitutional action, the statute must be construed as having the object, because the court is required to admit the constitutionality of an act of assembly if it can be brought within the exercise of any constitutional power. Keiningham v. Blake, 135 Md. 320, 322, 109 A. 65, 8 A.L.R. 1066; Painter v. Mattfeldt, 119 Md. 466, 472, 87 A. 413. The danger of perversion to private purposes may be admitted, but the Legislature is primarily entrusted with the care of that, and the courts have no duty in relation to it unless and until a perversion should be obvious. The fact that the private schools, including parochial schools, receive a benefit from it could not prevent the Legislature's performing the public function.

"This conclusion that the act must be regarded as one within the function of enforcing attendance at school, renders it unnecessary to consider separately the objection that a religious institution is aided. Art. 36, Declaration of Rights. The institution must be considered as aided only incidentally, the aid only a by-product of proper legislative action."

Judge Sloan, in a concurring opinion, after quoting at length from the compulsory school law, concludes:

"It will thus be seen that the State exercises its control over the education and compels the attendance at school of all children from seven to sixteen years of age, whether they attend public or private schools, and the provision for transportation to and from consolidated schools (Code, art. 77, sec. 50) is an aid to the end and purpose of the compulsory school laws. On this theory, and, in my opinion, only on this theory can the Acts of 1937, chapter 185, be sustained."

The Supreme Court, Special Term, Nassau County, New York, on November 9, 1937, held that transportation furnished students of schools other than public, pursuant to statutory authority, is not in aid of or maintenance of a denominational school, in violation of the constitutional prohibition, but is a service independent of the school itself, intended solely for the convenience of the pupils and to promote their education. Judd v. Board of Education, 300 N.Y.S. 1037. This case, however, was reversed by the Court of Appeals of New York in Judd v. Board of Education of Union Free School District, 278 N. Y. 200, 15 N.E. (2d) 576. The court based its decision on Section 4, Article 9 of the Constitution of New York, which reads as follows:

> "Neither the State nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

I quote from page 582 of the opinion as reported in 15 N.E. (2d):

> "The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance. It not only ignores the spirit, purpose and intent of the constitutional provisions but, as well, their exact wording. The object of construction as applied to a written constitution is to give effect to the intent

of the people in adopting it, and this intent is to be found in the instrument itself unless the words or expressions are ambiguous (Cooley's Constitutional Limitations, 8th Ed., pp. 124-126). There is nothing ambiguous here. The wording of the mandate is broad. Aid or support to the school 'directly or indirectly' is proscribed. The two words must have been used with some definite intent and purpose; otherwise why were they used at all? Aid furnished 'directly' would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished 'indirectly' clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes. How could the people have expressed their purpose in the fundamental law in more apt, simple and all-embracing language?"

Had the Constitution of New York been like the Constitution of Michigan, a different rule might well have been made.

Under date of February 17, 1936, the Attorney General of Massachusetts rendered an opinion to Hon. Charles G. Miles, Chairman of the Joint Committee on Education, in which he held that a measure requiring school committees to furnish free transportation to schools other than public schools did not violate the provisions of the Constitution, or necessarily forbid the appropriation of public funds for the support and maintenance of a private school. Report of Attorney General of Massachusetts, for year ending November 30, 1936, page 40.

Under date of July 14, 1936, the Attorney General of Iowa rendered an opinion to the County Attorney, Spirit Lake, Iowa, in which he held that the furnishing of transportion to pupils attending a private school was not in violation of a statute providing that "public money shall not be appropriated, given, or loaned by the corporate authorities of any county or township, to or in favor of any institution, school, association, or object which is under ecclesiastical or sectarian management or control." Report of Attorney General of Iowa, 1936, page 512.

In view of the policy of our courts to commit the public schools of the State entirely to the legislature, except as prohibited by the Constitution, and the presumption which exists as to the constitutionality of acts of the legislature, I am of the opinion that the proposed legislation is constitutional.

Very truly yours,

Thomas Read,
Attorney General.

AEK:lh

Appendix 'B'

Bibliography.

Vol. 51, Harvard Law Review, 935 'Constitutionality of Statute providing Free Transportation for Private and Parochial School Children.'

Vol. 7, The George Washington Law Review, 542, 'Use of Public Funds for Benefit of Parochial Schools.'

Vol. 36, Michigan Law Review, 1415, 'Private-Parochial Schools—Transportation of Pupils—Use of Public Funds.'

Vol. 37, Michigan Law Review, 335 'Private Parochial Schools—Transportation of Pupils—Use of Public Funds.'

Vol. 16, New York University Law Quarterly Review, 141, 'State Aid to Sectarian Schools—Transportation of Parochial School Pupils.'

Vol. 50, Yale Law Journal, 917 'Catholic Schools and Public Money.'

Vol. 7, Fordham Law Review, 436 'Constitutional Law, bus transportation for pupils of sectarian schools.'

Vol. 10, Yearbook School Law, 108 'Public Funds for private and sectarian schools.'

Bowker v Baker, et al., (Cal) 167 P (2) 256.